Akitek Timor (suing as a firm) v Tai Kian Cheong (t/a Tai Kian Cheong & Co)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–1–01 OF 2012(W)
ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, AHMAD MAAROF, ZALEHA ZAHARI AND SULONG MATJERAIE FCJJ
14 NOVEMBER 2013

Civil Procedure — Appeal — Appeal to Federal Court — Parties entered into collateral agreement to provide architectural services for project — Project abandoned after approval of building plan — Claim for fee under Pertubuhan Akitek Malaysia Scale of Professional Charges — Order of senior assistant registrar for assessment of damages to be fixed — Appeal against assessment — Reduction of amount of monies due — Appeal to Court of Appeal on issue of whether SAR order was valid — Whether Court of Appeal correct in questioning validity of SAR order

On 17 May 1974, the appellant entered into a collateral agreement with the respondent to provide architectural services for a project known as 'Proposed Bachang Hotel Project' ('the project'). The final building plan was approved by Majlis Perbadanan Melaka Tengah ('MPMT') but the respondent then abandoned the project in 1983. As at the date of abandonment of the project, the respondent had only paid RM16,000 to the appellant. Claiming that it was entitled to be paid a fee according to the Pertubuhan Akitek Malaysia Scale of Professional Charges, the appellant commenced proceedings against the respondent and three others for the fees in the sum of RM567,576.50. On 28 October 1987, the appellant applied for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('RHC') against the respondents. The senior assistant registrar, ('SAR') allowed interlocutory judgment to be entered against the respondents and a date for assessment of damages was fixed ('SAR order'). The respondents appealed to the judge in chambers against the SAR order ('the O 14 appeal') and the High Court Judge's decision in respect of the O 14 appeal stipulated that a date was to be fixed for the assessment of the amount due to the appellant. The record showed that the respondent did not appeal to the Court of Appeal against the said decision. The parties proceeded with the hearing of the assessment and on 19 October 1999, the deputy registrar ('DR') quantified the amount payable by the respondent to the appellant to be in the sum of RM405,967 ('the DR's order'). The respondent appealed against the DR order ('the assessment appeal'). A different High Court judge allowed the assessment appeal, setting aside the DR order and reducing the amount of RM405,967 to RM5,000. The appellant appealed to the Court of Appeal against the said decision on the issue of whether the SAR Order was valid. The appellant's appeal was dismissed and the orders of the

SAR, DR and High Court judge were deemed null and accordingly struck out. The case was sent back to the High Court for full trial. In the present appeal, the issue for determination was whether the Court of Appeal was, correct in questioning the validity of the SAR order.

Held, allowing the appeal with costs:

(1) The Court of Appeal erred in ruling the SAR order to be a nullity, in striking out the appellant's appeal and in making the consequential orders which it did. It was not open for the Court of Appeal do so as during the period of 19 years since the issuance of the order, none of the parties had questioned the validity of the SAR order. In any event, in view of the fact that the SAR order had been the subject matter of an appeal before the High Court judge, the order of the High Court judge who heard the O 14 appeal was the effective order in respect of the O 14 application. The order of the High Court Judge in respect of the O 14 appeal was not for assessment of damages but instead was for quantification of the amount due to the appellant (see paras 21 & 25).

(2) The appellant's claim pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional Charges being analogous to a claim for liquidated and ascertained damages, could be the subject of an application for summary judgment. On hearing the O 14 application, the SAR had the jurisdiction to make the order which he did pursuant to O 14 r 3 of the RHC, to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed (see para 26).

[Bahasa Malaysia summary

Pada 17 Mei 1974, perayu memasuki perjanjian kolateral dengan responden untuk memberikan khidmat seni bina untuk projek yang dikenali sebagai 'Proposed Bachang Hotel Project' ('projek'). Pelan bangunan yang terakhir telah diluluskan oleh Majlis Perbadanan Melaka Tengah ('MPMT') tetapi responden kemudiannya dihentikan pada tahun 1983. Pada tarikh penghentian projek tersebut, responden hanya membayar RM16,000 kepada perayu. Perayu mendakwa yang ia berhak untuk dibayar fi mengikut Pertubuhan Arkitek Malaysia Scale of Professional Charges, memulakan prosiding terhadap responden dan tiga yang lain untuk fi berjumlah RM567,576.50. Pada 28 Oktober 1987, perayu memohon untuk penghakiman ringkas A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap responden-responden. Timbalan kanan pendaftar ('TKP') membenarkan penghakiman interlokutori dimasukkan terhadap responden-responden dan tarikh untuk penilaian ganti rugi ditetapkan ('perintah TKP'). Responden-responden merayu kepada hakim dalam kamar terhadap perintah TKP ('rayuan A 14') dan keputusan hakim Mahkamah Tinggi berkaitan rayuan A 14 menetapkan bahawa tarikh akan ditetapkan

untuk penilaian jumlah yang kena dibayar kepada perayu. Rekod menunjukkan bahawa responden tidak merayu kepada Mahkamah Rayuan terhadap keputusan tersebut. Pihak-pihak meneruskan dengan pendengaran penilaian tersebut dan pada 19 Oktober 1999, timbalan pendaftar ('TP') mengira jumlah yang patut dibayar oleh responden kepada perayu adalah sejumlah RM405,967 ('perintah TP'). Responden merayu terhadap perintah TP ('rayuan penilaian'). Hakim Mahkamah Tinggi yang lain membenarkan rayuan penilaian tersebut, mengetepikan perintah TP dan mengurangkan jumlah RM405,967 kepada RM5,000. Perayu merayu kepada Mahkamah Rayuan terhadap keputusan atas isu sama ada perintah TKP adalah sah. Rayuan perayu ditolak dan perintah-perintah TKP, TP dan hakim Mahkamah Tinggi dianggap tak sah dan oleh itu dibatalkan. Kes dihantar semula ke Mahkamah Tinggi untuk perbicaraan penuh. Dalam rayuan, isu untuk penentuan adalah sama ada Mahkamah Rayuan adalah betul dalam mempersoalkan kesahan perintah TKP tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah Rayuan tersilap dalam memerintahkan perintah TKP menjadi tak sah, dalam membatalkan rayuan perayu dan dalam membuat perintah berikutnya yang mana ia buat. Ia tidak terbuka kepada Mahkamah Rayuan untuk berbuat demikian memandangkan semasa tempoh 19 tahun semenjak pengeluaran perintah tersebut, tidak satu pihak pun mempersoalkan kesahan perintah TKP. Walau bagaimanapun, mengambil kira fakta bahawa perintah TKP telah menjadi perkara rayuan di hadapan hakim Mahkamah Tinggi, perintah hakim Mahkamah Tinggi yang mendengar rayuan A O 14 adalah perintah efektif berkaitan permohonan A 14. Perintah Mahkamah Tinggi berkaitan rayuan A 14 bukan untuk penilaian ganti rugi tetapi adalah untuk mengira jumlah yang kena dibayar kepada perayu (lihat perenggan 21 & 25).

(2) Tuntutan perayu berikutan kontrak yang mana membentuk Pertubuhan Akitek Malaysia Scale of Professional Charges sebagai seakan-akan sama kepada tuntutan untuk ganti rugi yang tertentu dan ditetapkan, boleh menjadi subjek permohonan untuk penghakiman ringkas. Atas pendengaran permohonan A 14, TKP mempunyai bidang kuasa untuk membuat perintah yang mana beliau buat berikutan A 14 k 3 KMT, untuk memberi penghakiman interlokutori ke atas liabiliti, tetapi kuantum, kerana permohonan terhadap formula yang ditetapkan, akan dinilaikan (lihat perenggan 26).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 870–893.

Legislation referred to

Rules of the High Court 1980 O 2 r 1, O 2 r 2(1), O 14, O 14 rr 1(2), 3

Appeal from: Civil Appeal No W-02–42 of 2001 (Court of Appeal, Putrajaya)

WSW Davidson (Esther Chow Ruen Xin with him) (Azman Davidson & Co) for the appellant.
Ng Aik Beng (AB Ng & Partners) for the respondent.

Zaleha Zahari FCJ (delivering judgment of the court):

[1] The issue for determination in this appeal is whether the Court of Appeal was, in the circumstances of this case, right, when, on its own motion, at the hearing of the appellant's appeal against the decision of the High Court as to the amount of fees assessed and awarded to the appellant for work done, in questioning the validity of the earlier decision of the senior assistant registrar who heard the appellant's application for summary judgment. We heard this appeal on 31 May 2012 wherein we allowed the appeal with costs. The decision of the Court of Appeal was set aside and the case remitted back to the Court of Appeal to hear the appellant's appeal on its merits. We now give the reasons for our decision.

[2] The question of law posed to us for determination in this appeal was this:

> Whether the Court of Appeal in all the circumstances of this case were wrong to treat the order for summary judgment for damages made by SAR Rajendran on 22.9.89 and all consequential orders thereafter as a nullity and to have dismissed the appeal on that basis.

BACKGROUND

[3] Arkitek Timor (the plaintiff in the High Court and the appellant in this appeal) was appointed by Tai Kian Cheong trading as Tai Kian Cheong & Co (the fourth defendant in the High Court and the respondent in this appeal) to provide architectural services of a project known as 'Proposed Bachang Hotel Project' ('the project') on terms specified in the appellant's letter dated 3 May 1974 which incorporated the 'Pertubuhan Akitek Malaysia Scale of Professional Charges'. The offer was accepted by the appellant by its letter dated 10 June 1974. A collateral agreement was subsequently signed between them as set out in a letter dated 17 May 1974.

[4] The appellant's case was that it had prepared the Feasibility Study Report, sketch plans and building layout plans and had duly submitted these documents to Majlis Perbadanan Melaka Tengah ('MPMT') for approval

A sometime in August 1974. Planning approval was obtained from MPMT on 7 July 1975 subject to the incorporation of certain technical requirements.

[5] Upon the instructions of the respondent, sometime in 1976, the appellant prepared the working drawings for building plan approval. The B appellant's case was that it had prepared the working drawings which incorporated the technical requirements required by MPMT. The drawings prepared were then submitted to MPMT for building plan approval. The final building plan was approved by MPMT subject to compliance with two C conditions. The respondent had complied with both of these conditions.

[6] The respondent however abandoned the project in 1983. As at the date of abandonment of the project, the respondent had only paid the appellant RM16,000. The appellant contended that it was entitled to be paid a fee D according to the Pertubuhan Akitek Malaysia Scale of Professional Charges, ie 7 1/2 percent of the value of works executed, and 2/3rd of the fees that would have had to be paid for work that was included in the tender and subsequently omitted.

E **[7]** On 16 April 1987 the appellant instituted proceedings against the respondent and three others for the fees it claimed it was entitled to. The appellant quantified the fee payable to it to be in the sum of RM567,576.50. The appellant then, on 28 October 1987, applied for summary judgment F pursuant to O 14 of the Rules of the High Court 1980 (the 1980 Rules) to be entered against all of the defendants in the sum claimed.

[8] The senior assistant registrar, Mr N Rajendran ('SAR Rajendran') heard the O 14 application on 22 September 1989 and his decision was as follows, G 'that interlocutory judgment be entered against the defendants and a date be fixed for assessment of damages' ('SAR Rajendran's order'). The defendants appealed to the judge-in-chambers against SAR Rajendran's order ('the O 14 appeal').

H **[9]** The O 14 appeal against SAR Rajendran's order was heard by NH Chan J on 6 August 1990 whose findings was as follows:

> For the reasons which are apparent during the course of argument, I have indicated that the first three defendants ought to succeed on the ground that probably no I contract has been established against them. At any rate, it is an issue which should be tried.
>
> However it is also apparent from the reasons which I have also indicated during the course of argument that the fourth defendant is the contracting party with the architect.

In the result I would allow the appeal by the first three defendants with costs here and in the court below. Leave to defend to these defendants.

As for the appeal by the fourth defendant, it is dismissed with costs.

The order extracted of the High Court judge decision in respect of the O 14 appeal included the following, 'that a date be fixed for the assessment of the amount due to the plaintiff'. The record shows that the fourth defendant (ie the respondent in this appeal) did not appeal to the Court of Appeal against this decision of NH Chan J.

[10] During the period 5 May 1997–16 March 1999, the appellant and the respondent proceeded with the hearing of 'the assessment of the amount due to the Plaintiff'. Based on the evidence adduced by parties, the deputy registrar, Tengku Maimun bt Tuan Mat, (as she then was), on 19 October 1999, quantified the amount payable by the respondent to the appellant to be in the sum RM405,967.00 together with interest at 3%pa from January 1983–22 September 1989, and thereafter, at 8%pa until full payment together with costs ('the DR's order'). The respondent lodged an appeal to the judge-in-chambers against the DR's order ('the assessment appeal').

[11] A different High Court judge heard the assessment appeal. On 14 December 2000 the High Court judge hearing the assessment appeal allowed the respondent's appeal with costs. The DR's order dated 19 October 1999 was set aside. The amount the respondent was directed to pay the appellant was reduced from RM405,967 to RM5,000. The notes of proceedings recorded by the learned High Court judge on 10 November 2000 are reproduced for ease of reference:

Saya bersetuju dengan Peguam Defendan Keempat bahawa Kaedah-Kaedah Architects (Scale of Minimum Fees) Rules 1986 yang bertarikh 02.10.1986 tidak boleh dipakai di dalam kes semasa di mana Agreement antara Plaintif/Defendan Keempat dibuat sebelum itu iaitu 03.05.1974 di mana Defendan Keempat bersetuju untuk membayar RM5,000.00 sahaja untuk kesemua pelan yang disediakan dan dikemukakan kepada Kerajaan. Tidak ada apa-apa lain yang telah dikemukakan untuk menunjukan apa-apa lagi yang telah dibuat oleh Plaintiff selain daripada mengemukakan pelan-pelan tersebut P9 kepada Kerajaan. Oleh itu Plaintif hanya berhak kepada RM5,000.00 sahaja. Kaedah-kaedah tersebut masih belum wujud lagi. Sebenarnya inilah apa yang telah berlaku. Mahkamah telah melihat ekshibit 'P9' iaitu pelan-pelan berkenaan yang merupakan 14 keping kertas pelan sahaja. Saya tidak dapat menerima hujahan Peguam Plaintif bahawa Plaintif berhak kepada tuntutan sebanyak RM405,967.00 hanya untuk menyediakan pelan-pelan tersebut. Tidak ada apa-apa lain yang telah dikemukakan untuk menunjukkan apa-apa lagi yang telah dibuat oleh Plaintif selain daripada mengemukakan pelan-pelan tersebut (P9) kepada Kerajaan.

[12] The appellant appealed to the Court of Appeal against this decision of the High Court judge dated 14 December 2000.

[13] At the date of hearing of the appellant's appeal against the High Court judge's decision dated 14 December 2000 (ie on 6 April 2009) the Court of Appeal directed parties to submit on the following issue, 'Whether the SAR's order dated 22 September 1989 was valid? After hearing the submissions of parties on this issue, on 8 April 2009, the Court of Appeal decision was as follows: (a) the appellant's appeal be dismissed and costs be costs in the cause; (b) the orders of the senior assistant registrar, deputy registrar and High Court judge dated 22 September 1989, 6 August 1990, 19 October 1999 and 14 October 2000 were nullities and accordingly struck out; and (c) the case is sent back to the High Court for full trial.

[14] The Court of Appeal's reasoning in arriving at the decision which they did was as follows:

> We are of the view that as the claim of the appellant/plaintiff is for a liquidated sum of RM567,576.50, being a claim for professional fees, and there is no prayer for assessment of damages by the registrar, the senior assistant registrar hearing the O 14 summary judgment application had no power to make an order for damages to be assessed by a registrar. The only options available to the learned senior assistant registrar are either to dismiss the O 14 application or to award the fixed sum of RM567,576.50 as prayed for; or to award a lesser sum that she found to have been proved. As she had instead ordered that damages be assessed, we are of the opinion that the Order that she made was highly irregular and a nullity.

[15] Leave to appeal to the Federal Court was then granted to the appellant to appeal on the question of law as earlier stated in this judgment.

THE SUBMISSIONS

The appellant's submissions

[16] Dato' Davidson, counsel for the appellant, stressed the following facts: that it was incumbent upon a defendant to raise any irregularity before taking any further step in the proceedings (O 2 r 2(1)); the fact that the validity of SAR Rajendran's order was raised by the Court of Appeal on 6 April 2009 on its own motion, not at the instance of any party to the action; the fact that in all subsequents proceedings before the High Court the validity of SAR Rajendran's order was never questioned as being a nullity; the fact that the quantification of the fees payable by the respondent to the appellant for professional services rendered pursuant to the formula in the architect's scale of professional fees had been fought on its merits.

[17] He stressed the fact that, during the period of 19 years since the issuance SAR Rajendran's order, all parties had accepted SAR Rajendran's order to be valid, ie when the case was heard by the High Court judge who heard the O 14 appeal; when the case proceeded for assessment before the deputy registrar; thereafter, before the High Court judge who heard the assessment appeal.

[18] Dato' Davidson submitted the distinction between irregularities and nullities ceased to exist with the coming into force of the 1980 Rules. Acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities, not nullities. Order 2 r 1 of the 1980 Rules provides that any failure to comply with a requirement of the rules 'shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment, or order therein'. Order 2 r 2(1) then provides that 'any application to set aside for irregularity … shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity'.

[19] There is no jurisdictional bar to any claim for summary judgment except for those type of actions listed in Order 14 r 1(2). Claims of all sorts have been the subject matter of summary judgment applications, including claims for quantum meruit and unliquidated damages. Courts are empowered to 'give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or the relief claimed'. The appellant's claim, pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional charges (which included a formula as to an Architect's entitlement to fees on the abandonment of a project), was analogous to a claim for liquidated and ascertained damages, and can certainly be the subject of an application for summary judgment.

[20] Dato' Davidson submitted SAR Rajendran hearing the O 14 summary judgment application clearly had jurisdiction to make the order which he did pursuant to O 14 r 3, ie to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed. The only irregularity (if any), was for SAR Rajendran to refer to the quantification exercise as 'damages to be assessed'. The error, if at all, was but an error of description, which could have been corrected by the Court of Appeal by way of an amendment to SAR Rajendran's order. To rule SAR Rajendran's order and all subsequent orders to be nullities was prejudicial to the appellant as it would put the appellant back to square one with the evidential difficulties which arises from the long lapse of time.

[21] The Court of Appeal accordingly erred in treating the SAR Rajendran's order as a nullity, in striking out SAR Rajendran's order and in making the

consequential orders which it did.

The Respondent's Submissions

[22] The respondent counsel, Mr Ng Aik Beng, supported the reasoning given by the Court of Appeal in arriving at the decision which it did, ie by reason of the absence of an express prayer in the statement of claim for 'damages to be assessed'. The order made by SAR Rajendran could not come within the ambit of the general prayer sought by the appellant of 'other relief the court deems fit'. SAR Rajendran accordingly erred in making an order which had been not prayed for in the statement of claim.

[23] In the circumstances of this case SAR Rajendran could only make one of the following orders — either allow the O 14 application and give judgment in the amount prayed for; alternatively, give judgment for such lesser amount found proven. The fact that the court failed to fix a specified sum in this summary judgment application constitutes an issue to be tried. The court was to bear in mind the fact that the suit against the other three defendants was still pending before the High Court.

[24] On the lapse of time of a period of 19 years (22 September 1989–8 April 2009) before SAR Rajendran's order was questioned as being a nullity by the Court of Appeal on its own motion, he submitted that the Court of Appeal was entitled to do so as an appeal was by way of re-hearing. An order which was a nullity cannot be rectified. The Court of Appeal was right in not hearing the appeal on its merits and in making the orders which it did and in directing for the matter to go for trial.

DECISION

[25] On the procedural point, the Court of Appeal questioning SAR's Rejendran as being a nullity on its own motion we are of the following view. We are of the view that on the facts and circumstances of this case it was not open for the Court of Appeal do so as during the period of 19 years (22 September 1989–8 April 2009) since the issuance of the order none of the parties had questioned the validity of SAR Rajendran's order. In any event, in view of the fact that SAR Rajendran's order had been the subject matter of an appeal before the High Court judge, the order of the High Court judge who heard the O 14 appeal was the effective order in respect of the O 14 application. It is to be noted that the order of the High Court judge in respect of the O 14 appeal was not for 'assessment of damages' but instead 'quantification of the amount due to the appellant'.

[26] We are in agreement with the appellant's counsel that the appellant's

claim pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional charges (which included a formula as to an architect's entitlement to fees on the abandonment of a project) being analogous to a claim for liquidated and ascertained damages, can be the subject of an application for summary judgment. We are also in agreement with the appellant counsel that SAR Rajendran hearing the O 14 application had jurisdiction to make the order which he did pursuant to O 14 r 3, to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed.

[27] For the above reasons it is our finding that the Court of Appeal erred in ruling SAR Rajendran's order to be a nullity, in striking out the appellant's appeal and in making the consequential orders which it did.

[28] Our answer to the question of law posed was accordingly in the affirmative.

[29] The appeal was accordingly allowed with costs. The decision of the Court of Appeal dated 8 April 2009 was set aside and the case remitted back to the Court of Appeal to hear the appellant's appeal on its merits. The deposit to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor